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# Supreme Court of the United States.

OCTOBER TERM, 1969.

No. 882.

BOSTON & PROVIDENCE RAILROAD STOCKHOLDERS DEVELOPMENT GROUP,
*Petitioner,*
*v.*
CHARLES W. BARTLETT, TRUSTEE, ET AL.,
*Respondents.*

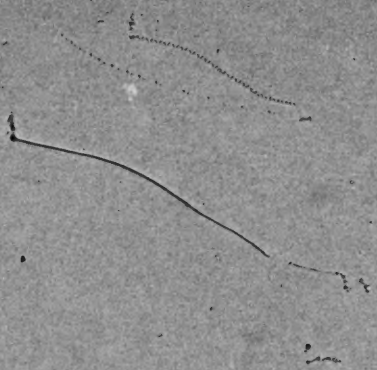
ON PETITION FOR A WRIT OF CERTIORARI.

## JOINT BRIEF FOR CHARLES W. BARTLETT, TRUSTEE IN REORGANIZATION OF THE BOSTON & PROVIDENCE RAILROAD, THE BOSTON & PROVIDENCE RAILROAD CORPORATION STOCKHOLDERS COMMITTEE, THE BOSTON & PROVIDENCE RAILROAD CORPORATION, DEBTOR, AND RICHARD JOYCE SMITH, TRUSTEE OF THE PROPERTY OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, RESPONDENTS, IN OPPOSITION.

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### Questions Presented.

1. Should the Supreme Court entertain a petition for certiorari filed, without any extension of time having been

granted, ninety-five days after the date on which the Court of Appeals for the First Circuit entered its order denying rehearing of the judgment now sought to be reviewed?

2. Did the Court of Appeals properly hold that the petitioner was not entitled, on an appeal from confirmation of the debtor's plan of reorganization, to raise again questions concerning the provisions of the plan which had been the subject of Petitioner's previously dismissed appeal from the District Court's order approving the plan?

3. Did the Court of Appeals properly dismiss, as untimely, Petitioner's supplemental notice of appeal (filed more than six months after confirmation and more than five months after denial of Petitioner's motion to amend the order of confirmation) raising additional questions previously disposed of by the dismissal of the appeal from approval of debtor's plan of reorganization?

## Statutes and Rules of Court Involved.

Relevant portions of 28 U.S.C. Section 2101; of Supreme Court Rules 21 and 22; and subsections (e) and (f) of Section 77 of the Bankruptcy Act (11 U.S.C. Section 205(e) and (f)) are printed in Appendix A hereto.

## Statement of the Case.

The pending plan of reorganization of the Boston & Providence Railroad Corporation (the "Debtor") was confirmed by the United States District Court for the District of Massachusetts (the "District Court") on November 4, 1968. In accordance with the requirements of Section 77 of the Bankruptcy Act (11 U.S.C. Section 205), the plan had previously been approved by the Interstate Commerce Commission (327 I.C.C. 10, March 11, 1966) and by the

District Court. *In re Boston & Providence Railroad Corporation,* 260 F. Supp. 415 (November 28, 1966). Petitioner's appeal from the District Court's order and opinion approving the plan was dismissed* by the Court of Appeals for the First Circuit ("Court of Appeals") on March 29, 1967. Rehearing was denied* on April 18, 1967, and the Supreme Court denied certiorari and Petitioner's motion for leave to file a petition for a writ of mandamus on December 4, 1967. *Boston & Providence Railroad Stockholders Development Group* v. *Bartlett,* 389 U.S. 974, and *Boston & Providence Railroad Stockholders Development Group* v. *United States Court of Appeals for the First Circuit,* 389 U.S. 967.

Thereafter, the approved plan was submitted to the creditors and stockholders of the Debtor and was overwhelmingly approved by them. However, because the proceedings had been delayed, by reason of the Petitioner's unprosecuted appeal and other tactics, by more than 18 months after certification of the plan by the Interstate Commerce Commission (the "Commission") to the District Court, Petitioner was able by its petition of April 19, 1968, as a matter of right, to require the Commission to consider whether changes or developments had occurred which required it to reconsider the plan (11 U.S.C. 208(a)(1)). After due deliberation, the Commission on September 16, 1968, denied the petition and on October 31, 1968, denied reconsideration. Thus, on November 4, 1968, the District Court was at last able to enter its order confirming the plan. Petitioner's motion to amend the order of confirmation was denied on December 4, 1968, and on Febru-

*The opinions of the Court of Appeals, which are not reported, are set forth in Appendices A and B to Petitioner's motion for leave to file a petition for a writ of mandamus. Supreme Court of the United States, Oct. Term, 1967, No. 661, Misc.

ary 3, 1969, Petitioner filed a notice of appeal from the confirmation order and certain other orders of the District Court also entered on or about November 4, 1968.

On July 24, 1969, the Court of Appeals affirmed the District Court's order confirming the plan and entered judgment. Its opinion is printed in full in the appendix to Petitioner's present brief. On August 21, 1969, rehearing was denied by the Court of Appeals. Ninety-five days thereafter, on November 24, 1969, Petitioner filed its present petition for writ of certiorari ("Petition"), having previously (on the ninety-first day) requested an extension of time which was denied.

## Argument.

### I.

### The Present Petition for a Writ of Certiorari should be Dismissed as Untimely.

28 U.S.C. Section 2101(c) requires that an application for any writ of certiorari to review a civil proceeding be made within 90 days after the entry of the judgment sought to be reviewed, unless one of the justices, for good cause shown, extends the time for applying by not more than 60 days. The 90-day period is to be measured from the date of the judgment below, or, where a petition for rehearing has been entertained and denied, from the date of such denial. *Pfister* v. *Northern Illinois Finance Corp.*, 317 U.S. 144, 149-150 (1942).

In the present case, Petitioner should have filed its Petition and the certified transcript of the record not later than November 19, 1969, the ninetieth day following the denial of Petitioner's petition for rehearing by the Court of Appeals. 28 U.S.C. Section 2101(c); Supreme Court Rules 21 and 22. Petitioner did neither, but merely sent

a telegram to the Clerk of the Supreme Court, on November 20, 1969, asking for an extension of the time for filing. This request was denied on November 24, 1969. The Petition having been filed more than 90 days after the denial of rehearing below, and Petitioner's request for extension of time for filing the Petition also having been denied, the Petition should be denied as untimely.

This is the third time since it made itself a party to these proceedings in 1954 that Petitioner has applied for a writ of certiorari herein. Petitioner's principal counsel, who filed all three of these petitions, may be presumed by now to be thoroughly familiar with the Supreme Court's requirements with respect to timely filing. There is, we submit, no reason and no basis for indulging Petitioner further in this matter.

## II.

### The Court of Appeals Properly Held that the Petitioner was Not Entitled on an Appeal from Confirmation to Raise Questions Concerning the Provisions of Debtor's Plan of Reorganization which had been the Subject of Petitioner's Previously Dismissed Appeal from Approval of the Plan.

In this proceeding, as in most railroad reorganization proceedings under Section 77 of the Bankruptcy Act,* the opponents of the plans of reorganization which have been certified by the Commission and approved by the District Court have chosen to challenge the provisions of those plans by appeals from the District Court's orders of approval. Thus in *Freeman* v. *Mulcahy*, 250 F. 2d 463 (1st

*E.g., *In re Chicago, M., St. P. & P. R. Co.*, 124 F. 2d 754 (7th Cir. 1942) and *In re New York, New Haven & Hartford Railroad Co.*, 147 F. 2d 40 (2d Cir. 1945).

Cir. 1957), cert. and rehearing den., sub nom. *Boston & Providence Railroad Corporation* v. *New York, New Haven & Hartford Railroad Co.*, 356 U.S. 939 and 357 U.S. 915 (1958), the provisions of the Debtor's plan approved by the Commission in 1954 and by the District Court in 1956 (*In the Matter of Boston & Providence Railroad Corporation*, 143 F. Supp. 866) were fully reviewed by an appeal to the Court of Appeals, in which Petitioner joined. Following this ready precedent, Petitioner, on February 15, 1967, docketed an appeal from the District Court's order and opinion of November 4, 1966, approving the present plan of reorganization of the Debtor.

The course of that appeal (the 1967 appeal) to the time of its dismissal for lack of diligent prosecution, is traced in the several briefs filed by the Respondents in opposition to Petitioner's 1967 petitions to this court seeking writs of certiorari and mandamus. Supreme Court of the United States, October Term, 1967, Nos. 624 and 661, Misc. This court denied both petitions on December 4, 1967. *Boston & Providence Railroad Stockholders Development Group* v. *Bartlett*, 389 U.S. 974, and *Boston & Providence Railroad Stockholders Development Group* v. *United States Court of Appeals for the First Circuit*, 389 U.S. 967.

The Court of Appeals held, in the instant appeal, that the Petitioner could not, under the guise of an appeal from the confirmation order, "relitigate the issues that were settled against it by the dismissal of its appeal from the District Court's order approving the reorganization . . ." *In re Boston & Providence Railroad Corporation, Debtor*, 413 F. 2d 137, 139; Petition, Appendix A, page 12 (1969).

Respondents submit that the Court of Appeals was correct in so holding. Petitioner's assertion that it is entitled to reargue these previously settled points is based upon a misinterpretation of the first clause of Section 77(f) of

the Bankruptcy Act (11 U.S.C. Section 205(f)) which states that "Upon confirmation by the judge, the provisions of the plan and of the order of confirmation shall, subject to the right of judicial review, be binding upon the debtor, all stockholders . . . and all creditors . . ." Petitioners argue that "upon" means "after," but it is only the review of the provisions of the order of confirmation and the binding of the parties which necessarily follow "upon" or "after" (and as a consequence of) confirmation, *not* the review of the provisions of the plan which, in the statutory scheme of Section 77, are fixed by the earlier order of approval. A practice of making all provisions of a plan of reorganization subject to a post-confirmation appeal, even when previously raised in an earlier appeal, would constitute a great and vexatious waste of time for the District Court and all appellate courts and a wholly unnecessary burden and expense for the parties to the reorganization proceeding. In this very case, we have seen that, by bringing an appeal at the beginning of 1967, Petitioner was able, despite every effort of the proponents of the plan to expedite proceedings, to delay confirmation until November, 1968. To hold, in effect, that these two years, and all the labor and expense that went into them, are of no consequence would be to make a mockery of the Bankruptcy Act and of the judicial process. *White* v. *Higgins,* 116 F. 2d 312 (1st Cir. 1940).

The cases in other circuits do not conflict. The Court of Appeals has quite properly distinguished the only cases which Petitioner has cited (*In re Chicago & N. W. Ry. Co.*, 126 F. 2d 351, and *In re Denver & R. G. W. Ry. Co.*, 150 F. 2d 28) as cases in which no appeals had been taken prior to confirmation.

Petitioner seeks support for its position in a comment in Collier on Bankruptcy, 14th ed. (vol. 6, §7.41) concerning the review of a plan of corporate reorganization under

Chapter X of the Bankruptcy Act. But the prerequisites for confirmation set forth in §221 of Chapter X (11 U.S.C. Section 621) are not the same as those for confirmation of a plan of reorganization of a railroad under Section 77. Section 221 provides that the judge shall confirm a plan of corporate reorganization if satisfied that its provisions are in compliance with Article VII, §199 and Article X of Chapter X, that it is fair, equitable and feasible, and that its proposal and acceptance are in good faith and have not been made or procured by improper means. Section 180 of Chapter X, moreover, expressly provides that the order of the judge approving a Chapter X plan shall not affect the right of the debtor, a creditor, indenture trustee or stockholder to object to the confirmation of the plan.

Section 77(e), on the other hand, directs that the judge shall confirm a plan of railroad reorganization if satisfied that it has been accepted by the necessary percentages of creditors and stockholders and that such acceptance has not been procured by improper means. Thus, Chapter X requires reexamination of the provisions of a corporate plan as a part of the confirmation process, while §77 provides for examination of the provisions of a railroad plan, by the judge, only at the time of approval and excludes such examination from the confirmation process, except in the case of a confirmation made by the judge after the creditors and stockholders have failed to accept the same.

The foregoing distinction between Chapter X and §77 proceedings is not accidental, for it will be remembered that before a §77 plan is approved by the judge it will already have been approved by the Commission after hearing and review. Moreover, if 18 months intervenes between the District Court's approval and confirmation, any party may, under 11 U.S.C. §208(a) (1), require the Commission

to consider whether changes or developments have occurred which in equity require that the plan be reexamined. Petitioner has had the benefit of this administrative remedy. Indeed the Commission's denial of rehearing of Petitioner's Section 208(a) (1) petition was handed down on October 31, 1968, less than a week before the judge's order of confirmation.* There is thus no basis in the Bankruptcy Act or in equity for conferring upon Petitioner a right of repetitive review by the Court of Appeals.

Petitioner's objection to the Debtor's plan of reorganization based on the *Hudson Tubes* case (*Port Authority Trans-Hudson Corp.* v. *Hudson Rapid Tubes Corp.*, 20 N.Y. 2d 457, 231 N.E. 2d 734 (1967)) was fully considered both by the Commission in the above-mentioned Section 208(a) (1) proceeding (*Boston & Providence Railroad Corporation Reorganization*, 333 I.C.C. 713 (1968)) and by the Court of Appeals (*In re Boston & Providence Railroad Corp.*, 413 F. 2d 137, 140; Petition, Appendix A, page 14 (1969)). Both tribunals properly rejected this argument for the fundamental reason that the present plan is not a "scrap value" plan but one which, through the issuance of certificates of contingent beneficial interest to the shareholders makes provision for those extra elements of value which the Petitioner claims that the plan of reorganization, the Commission and the courts have ignored.

## III.

### The District Court Properly Dismissed Petitioner's Supplemental Notice of Appeal.

The last three questions presented by the Petition were the subject of the supplemental notice of appeal filed by Petitioner on May 23, 1969, on the eve of oral argument of

*Petitioner took no appeal from the Commission's order.

the 1969 appeal. The Court of Appeals dismissed these appeals as untimely, pointing out that the motions and petition in question had all become ripe for appeal not later than November 4, 1968, the date of the confirmation of the Debtor's plan of reorganization which rendered them all moot. The said supplemental notice should have been filed not more than 60 days after November 4, 1968. Federal Rules of Appellate Procedure, Rules 2 and 26(b).

It may also be noted that these supplemental appeals are largely restatements of points 1(e), 3 and 2, respectively, of *Appellant's Statement of Intended Points* filed in the 1967 appeal, disposed of by the dismissal thereof. See Appendix B, below.

**Conclusion.**

For the foregoing reasons, the Respondents hereby respectfully request that the Petition be denied.

Respectfully submitted,

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## Appendix A.

### Relevant Statutes.

Paragraph (c) of 28 U.S.C. 2101 reads as follows:

> "(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

Paragraph 1 of Rule 21 of the Supreme Court Rules reads as follows:

> "1. Review on writ of certiorari shall be sought by filing with the clerk, with proof of service as required by Rule 33, forty printed copies of a petition, which shall conform in all respects to Rule 23, and a transcript of the record in the case, including the proceedings in the court whose judgment or decree is sought to be reviewed, which shall be certified by the clerk of the appropriate court or courts below. The entire record in the court to which certiorari is addressed shall be filed unless the parties agree that specified parts may be omitted as unnecessary for the determination of the petition or of the writ, if it be granted. The provisions of Rule 12 (3) with respect to original papers shall apply to all cases sought to be reviewed on writ of certiorari. Service of a copy of the transcript of the record is not required."

Paragraphs 3 and 4 of Rule 22 of the Supreme Court Rules read as follows:

"3. A petition for writ of certiorari in all other cases shall be deemed in time when it and the certified record required by Rule 21 are filed with the clerk within the time prescribed by law.

"4. An application for extension of time within which to file a petition for writ of certiorari must set out, as in a petition for certiorari (see Rule 23(1), subparagraphs (b) and (f)), the grounds on which the jurisdiction of this court is invoked, must identify the judgment sought to be reviewed and have appended thereto a copy of the opinion, and must set forth with specificity the reasons why the granting of an extension of time is deemed justified. For the time and manner of presenting an application for extension of time within which to file a petition for writ of certiorari, see Rules 34, 35(2), and 50. Such applications are not favored."

Section 77(e) of the Bankruptcy Act (11 U.S.C. 205(e)) reads, in part, as follows:

"If the judge shall approve the plan, he shall file an opinion, stating his conclusions and the reasons therefor, and enter an order to that effect, and shall send a certified copy of such opinion and order to the Commission. The plan shall then be submitted by the Commission to the creditors of each class whose claims have been filed and allowed in accordance with the requirements of subsection (c) of this section, and to the stockholders of each class, and/or to the committees or other representatives thereof, for acceptance or rejection, within such time as the Commission shall specify, together with the report or reports of the Commission thereon or such a summarization thereof as the Commission may approve, and the opinion and

order of the judge . . . The Commission shall certify to the judge the results of such submission.

"Upon receipt of such certification, the judge shall confirm the plan if satisfied that it has been accepted by or on behalf of creditors of each class to which submission is required under this subsection holding more than two-thirds in amount of the total of the allowed claims of such class which have been reported in said submission as voting on said plan, and by or on behalf of stockholders of each class to which submission is required under this subsection holding more than two-thirds of the stock of such class which has been reported in said submission as voting on said plan; and that such acceptances have not been made or procured by any means forbidden by law: *Provided,* That, if the plan has not been so accepted by the creditors and stockholders, the judge may nevertheless confirm the plan if he is satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it; that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts; and that the plan conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this subsection (e)."

Section 77(f) of the Bankruptcy Act (11 U.S.C. 205 (f)) reads, in part, as follows:

"(f) Upon confirmation by the judge, the provisions of the plan and of the order of confirmation shall, subject to the right of judicial review, be binding upon the debtor, all stockholders thereof, including those who have not, as well as those who have, accepted it,

and all creditors secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed, and, if filed, whether or not approved, including creditors who have not, as well as those who have, accepted it."

## Appendix B.

RELEVANT PORTIONS OF APPELLANT'S STATEMENT OF INTENDED POINTS IN THE 1967 APPEAL.

1(E), 2 and 3 of the *Appellant's Statement of Intended Points* filed by the Respondent as Appellant in the case of *Boston and Providence Railroad Stockholders Development Group* v. *Charles W. Bartlett, Trustee, et al.*, United States Court of Appeals for the First Circuit, No. 6873, (1967) read as follows:

"E. The plan would force the Debtor to surrender $4,991,000 in new bonds plus a sinking fund worth approximately $1,000,000 in order to satisfy claims for principal and interest on $2,170,000 in old debentures, although the Debtor was liable only as surety on the debentures, which were extinguished long ago when the principal obligor acquired them after maturity by satisfying the holders.

. . . . . .

"2. The District Court erred in not requiring the Debtor and its Trustee to file current annual reports to the Commission as a Class I line-haul common carrier under Section 20 of the Interstate Commerce Act, instead of filing detrimentally as a lessor and on the lessor form.

"3. The District Court erred in refusing to hear Appellant's petition filed August 27, 1965, relative to sale of the Debtor's railroad properties north of Readville and Dedham to the Commonwealth of Massachusetts (or agencies thereof) and abrogation of franchise obligations now covering such properties, so as to accomplish those results efficiently in the interest of all concerned by adding appropriate provisions to the plan."